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8 RESH, INC,

Plaintiff,

v.

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11 SKIMLITE MANUFACTURING INC, et  
al.,

12 Defendants.  
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Case No. [22-cv-01427-EJD](#) (VKD)

**ORDER RE DISCOVERY DISPUTE RE  
ESI ORDER**

Re: Dkt. Nos. 46, 47

14 The Court has reviewed the parties' competing proposals for an order governing the  
15 preservation, search, collection, and production of ESI (Dkt. Nos. 46, 47) and resolves the  
16 remaining disputes as follows:

17 1. The parties dispute whether text messages should be preserved and searched as  
18 accessible ESI or whether they should be deemed not reasonably accessible and therefore not  
19 subject to preservation or searching. In many cases, discovery of text message may be unduly  
20 burdensome and not proportional to the needs of the case. Here, plaintiff Resh has shown good  
21 cause to obtain discovery of text messages to and from defendant Barrett Conrad. *See* Dkt. No. 47  
22 at 2 and Ex. A. For this reason, the Court will require Barrett Conrad to preserve text messages  
23 for the relevant time period (which the parties do not address), and these messages are subject to  
24 the terms of the ESI order. As no such showing has been made with respect to any other  
25 custodian, no affirmative steps need be taken to preserve text messages of any other custodian, and  
26 such messages shall be considered not reasonably accessible unless the Court orders otherwise.

27 2. The parties also dispute how many search terms must be applied to custodial email.  
28 The number of search terms is generally less important than the efficacy of the particular terms

selected in identifying potentially responsive documents. As a default, the parties should attempt to limit the number of terms to no more than 10 search terms per custodian; however, for some custodians, 10 search terms may be too few, and for others, it may be too many. The Court expects the parties to confer and reach agreement on the search terms to be applied to each custodian's ESI. If they cannot reach agreement, they may submit their dispute for resolution using the discovery dispute resolution procedures in Judge DeMarchi's Standing Order for Civil Cases.

3. Defendants argue that the ESI order should clarify that no party is required to re-collect and re-produce its prior productions to include metadata. Plaintiff does not address this issue. It is not clear from the parties' submissions whether there is a disagreement on this point or not. It also is not clear whether the relevant document requests demanded that responsive electronically stored information must be produced with metadata, or whether any such demand was objected to. *See* Fed. R. Civ. P. 34(b)(1)(C), (b)(2)(D). As a general matter, if documents were produced by a party in .pdf format without metadata in response to document requests that did not specify a production format including metadata, the Court will not require any party to re-collect or re-produce such documents.

The parties shall submit a proposed ESI order for the Court's approval that conforms to the foregoing resolution of disputed issues by **January 6, 2023**.

## IT IS SO ORDERED.

Dated: January 3, 2023

Virginia K. DeMarchi  
VIRGINIA K. DEMARCHI  
United States Magistrate Judge